

explained that that the derogatory information fell within the purview of two potentially disqualifying criterion set forth in the security regulations at 10 C.F.R. § 710.8, subsections (g) and (l) (Criteria G and L).² Further, in describing the derogatory information, the Notification Letter cited Guidelines E and K of the Revised Adjudicative Guidelines for Determining Eligibility for Access Classified Information, The White House (December 19, 2005) (hereinafter referred to as Adjudicative Guidelines).

Upon his receipt of the Notification Letter, the Individual exercised his right under the Part 710 regulations to request an administrative review hearing, and I was appointed the Administrative Judge in the case. The DOE submitted seven Exhibits (Exs. 1-7) into the record for the hearing. At the hearing, the Individual presented 10 Exhibits (Exs. A-J) along with the testimony of his former supervisor (Supervisor) and the manager (Manager) who currently directs the Individual. *See* Transcript of Hearing, Case No. PSH-15-0076 (“Tr.”).

II. Regulatory Standard

A. Individual’s Burden

A DOE administrative review proceeding under Part 710 is not a criminal matter, where the government has the burden of proving the defendant guilty beyond a reasonable doubt. Rather, the standard in this proceeding places the burden on the individual because it is designed to protect national security interests. This is not an easy burden for the individual to sustain. The regulatory standard implies that there is a presumption against granting or restoring a security clearance. *See Department of Navy v. Egan*, 484 U.S. 518, 531 (1998) (clearly consistent with the national interest standard for granting security clearances indicates “that security determinations should err, if they must, on the side of denials”); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (strong presumption against the issuance of a security clearance).

The individual must come forward with evidence to convince the DOE that restoring his access authorization “will not endanger the common defense and security and will be clearly consistent with the national interest.” 10 C.F.R. § 710.27(d). The individual is afforded a full opportunity to present evidence supporting his eligibility for an access authorization. The Part 710 regulations are drafted so as to permit the introduction of a very broad range of evidence at personnel security hearings. Even appropriate hearsay evidence may be admitted. 10 C.F.R. § 710.26(h). Thus, an

² Criterion G refers to information suggesting that an individual “[f]ailed to protect classified matter, or safeguard special nuclear material; or violated or disregarded security or safeguards regulations to a degree which would be inconsistent with the national security; or disclosed classified information to a person unauthorized to receive such information; or violated or disregarded regulations, procedures, or guidelines pertaining to classified or sensitive information technology systems.” 10 C.F.R. § 710.8(g). Criterion L references information indicating that an individual “[e]ngaged in any unusual conduct or is subject to any circumstances which tend to show that the individual is not honest, reliable, or trustworthy; or which furnishes reason to believe that the individual may be subject to pressure, coercion, exploitation, or duress which may cause the individual to act contrary to the best interests of the national security.” 10 C.F.R. § 710.8(l).

individual is afforded the utmost latitude in the presentation of evidence to mitigate the security concerns at issue.

B. Basis for the Administrative Judge's Decision

In personnel security cases arising under Part 710, it is my role as the Administrative Judge to issue a decision that reflects my comprehensive, common-sense judgment, made after consideration of all the relevant evidence, favorable and unfavorable, as to whether the granting or continuation of a person's access authorization will not endanger the common defense and security and is clearly consistent with the national interest. 10 C.F.R. § 710.7(a). I am instructed by the regulations to resolve any doubt as to a person's access authorization eligibility in favor of the national security. *Id.* In considering these factors, the Administrative Judge also consults Adjudicative Guidelines that set forth a more comprehensive listing of relevant factors and considerations.

III. The Notification Letter and the Security Concerns at Issue

As previously noted, the LSO cites Criteria G and L as the basis for suspending the Individual's security clearance. Deliberate or negligent failure to comply with rules and regulations for protecting classified or other sensitive information raises doubt about an individual's trustworthiness, judgment, reliability, or willingness and ability to safeguard such information, and is a serious security concern. Adjudicative Guidelines, Guideline K, at ¶ 33; Adjudicative Guidelines, Guideline E, at ¶ 15. From the Individual's own admissions regarding his mishandling of classified documents, I find that the LSO had ample ground to invoke Criteria G and L to suspend the Individual's security clearance.

IV. Findings of Fact

The Individual testified that he has held a security clearance since 1970. Tr. at 104. The Individual admits that, while employed at another federal agency, he left a confidential document unattended on his desk sometime in 1993. When discovered, the Individual was issued a security infraction. Tr. at 106. The Individual admitted that he had been careless to leave the document unattended. Tr. at 106-07. In 1994, the Individual received another security infraction for leaving classified documents unattended at his desk. Tr. at 107-09. The Individual does not remember having received specific training at this agency regarding the handling of classified documents. Tr. at 110. The Individual also recounted an incident occurring in 1995 where he removed an allegedly "confidential" document from his office, scanned it into his computer, and carried the computer to a meeting in another country. Tr. at 112.³ The Individual testified that the document was not

³ At his polygraph examination and during the PSI, the Individual stated that the document he carried with him could have been classified. Ex. 4 at 70-73, 76, 85 (PSI); Ex. 3 at 3 (Polygraph Admissions).

confidential but was marked “Official Use Only” and that therefore there was no restriction on the document’s transfer outside his office. Tr. at 112-13, 117.⁴

At the hearing, the Individual recounted another security incident in 1996 where he had removed a confidential document from his office and brought it home to review. Tr. at 118. The following day he left the document at his house and did not return it until the next day. Tr. at 118-19; *see* Ex. 3 at 3.⁵ The Individual believes that his taking the document home was a “monumentally stupid” act and was inexcusable. Tr. at 118, 126.

The Individual testified that, in 2009, while working in another federal position, he improperly removed classified documents from his office. Tr. at 129. On the day of this incident, the Individual was exhausted from a lack of sleep the previous night. To be better refreshed for an upcoming meeting, the Individual decided to go to his parked automobile and take a nap. However, the room where the classified document safe was located was occupied with an important meeting. Tr. at 129. Consequently, the Individual placed the documents in a pouch authorized for carrying such documents and took the pouch with him to his automobile. Tr. at 130. Upon awaking he went back to his office. When asked by another employee about where one of the classified documents he was reviewing was located, he realized that he had left the pouch in his automobile. He immediately went to his vehicle to retrieve the pouch. Tr. at 130. He then wrote up a two-paragraph report of the incident to his superior but did not receive any discipline for the incident. Tr. at 130. The Individual also testified that if he had remembered to take the pouch from his vehicle the event would not have been a security incident. Tr. at 131.

During 2010, the Individual was involved in two additional security incidents. Sometime in 2010, the Individual brought a government-issued cell phone (cell phone) into a secured space. Tr. at 137-38. The Individual was informed immediately that the cell phone was not permitted in the secured space and he then removed it from the secured space. Tr. at 139-40. The Individual also testified that in 2010 he had left classified documents unattended when he went away from his desk. Tr. at 145. Another co-worker discovered the unattended documents and informed the Individual’s Supervisor. Tr. at 146. The Individual’s Supervisor counselled the Individual to always insure that classified documents were properly attended. Tr. at 146-48. The Individual admits that he was “really careless” in leaving the documents unattended. Tr. at 151.

The Individual testified, concerning his statement in the PSI, that, in 2013, he invited an official (Official 1) to speak at his facility about a specially classified subject and that he had failed to formally confirm that Official 1 had a clearance level high enough to discuss the specially classified information. Ex. 4 at 17-18. At the hearing, the Individual testified that, upon further thought, he had confirmed that Official 1 had a sufficient security clearance prior to his speech.

⁴ The Individual, when first asked about the document during the PSI, stated that it was “Official Use Only” or “Limited Official Use.” Ex. 4 at 70-71.

⁵ During the PSI, the Individual stated that he had left the document at his house when he reported to work the following day. Ex. 4 at 81.

Tr. at 167-68. The Individual has also submitted written evidence indicating that he had, in fact, ascertained the clearance level of the official prior to Official 1's speech. Ex. C; Ex. G.; Ex. H; Ex. I; Ex. J.

In 2014, the Individual was involved in two other security incidents. Sometime in 2014, the Individual left his classified computer unattended to take a bathroom break. Tr. at 149. The Individual believed that the classified computer, like other computers, would shut down if he did not perform any inputs within a period of time. However, the classified computer continued to remain active with classified material still displayed on its video screen. Tr. at 149, 154. The unattended computer was discovered by a co-worker and reported to the Supervisor. Tr. at 150. The Individual did not remember receiving any training regarding the use of a classified computer. Tr. at 150. The Individual asserted at the hearing that he had never left a classified computer unattended prior to this incident. Tr. at 150-51. On another occasion in 2014, the Individual again brought a cell phone into a secured space and the phone began to ring.⁶ Tr. at 140. The Individual immediately took it out of the room and was subsequently issued a security infraction by the Supervisor. Tr. at 141.

In October 2014, the Individual made an appointment to talk to an official (Official 2) to discuss information that was specially classified. Tr. at 163. He did not formally check on Official 2's clearance level through his facility's security department since he assumed that Official 2 had a sufficient security clearance to discuss the information and he knew that, in the prior year, that Official 2's office was cleared for such discussions. Tr. at 163, 171. After he went to the Official 2's office for the discussion, he reported his discussion to his Supervisor. Tr. at 164. The Individual was then asked to attend a meeting with his Supervisor and other facility security personnel. At the meeting, the Individual was informed that Official 2 did not have the required level of security clearance and that Official 2's office was not cleared for discussions of such material. Tr. at 164. The Individual's security clearance for specially classified material was revoked. Tr. at 165. The Individual testified that after this incident he checked with Official 2's employer and that he was informed that the Official 2's office was cleared for discussion of specially classified material. Tr. at 165. The Individual admits that he did not go through his facility's official procedure to confirm that Official 2 had the required security clearance but a subsequent examination found that Official 2, in fact, did have the required level of security clearance. Tr. at 174-75. The Individual has also submitted written confirmation that Official 2 possessed the required security clearance at the time of their discussion. Ex. B.

The Supervisor has known the Individual since 2007 or 2008. Tr. at 32. In 2010, the Individual began work in the Supervisor's work group. Tr. at 33. The Supervisor generally confirmed the factual details concerning the Individual's security incidents from 2010 through 2014. *See, e.g.*, Tr. at 40-57, Tr. 58-62. Regarding the 2014 security incident which resulted in the Individual's loss of his security clearance for specially classified material, the Supervisor stated that, at the meeting with the Individual and facility security personnel, a facility security official informed

⁶ In the PSI, the Individual identified this incident as occurring in May or June 2014. Ex. 4 at 35.

him that Official 2 did not have the required special security clearance needed to discuss information with the Individual and that Official 2's office was not cleared to discuss such information. Tr. at 62-63.

Prior to the 2014 incident where the Individual discussed specially classified information with Official 2, the Supervisor believed that "we were managing the control of classified information relatively well" and that the Individual's security errors had been adequately handled. Tr. at 65-66. However, the 2014 incident concerning the Individual's discussion of specially classified material with Official 2 gave the Supervisor concern. Tr. at 66. The Supervisor believes that the Individual would function best in "a very structured environment with very specific guidance as to what would be expected of him." Tr. at 66. When asked if he would have any objection as to the Individual having access to classified material, the Supervisor replied "I think he would have to be supervised, but I believe he would -- he would -- especially with all of the issues that he's had to endure, I think it's been a painful reminder of the need to protect it, but I think it would have to be structured." Tr. at 66.

The Manager currently supervises the Individual. Tr. at 13. The Manager believes that the Individual has fully met the expectations of the office where he now works. Tr. at 17. Despite having reviewed the derogatory information contained in the Notification Letter, the Manager believes that the Individual would "redouble" his efforts not to commit future security errors and has shown regret over his past errors. Tr. at 19-20.

V. Analysis

I have thoroughly considered the record of this proceeding, including the submissions tendered in this case and the testimony of the witnesses presented at the hearing. The derogatory information cited under Criteria G and L are identical. Consequently, I have considered both criteria together for purposes of my analysis to determine the Individual's eligibility for access authorization. My analysis has been guided by the applicable factors prescribed in 10 C.F.R. § 710.7(c) and the Adjudicative Guidelines. After due deliberation, I have determined that the Individual's security clearance should not be restored. I cannot find that restoring the Individual's security clearance would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. § 710.27(a). The specific findings that I make in support of this decision are discussed below.

With regard to the security incidents occurring in 2010 and after, the Individual has admitted the accuracy of the allegations with exception of the following: the allegation that in 2013 he failed to formally verify Official 1's clearance level, the allegation that Official 2 did not have proper security clearance for their 2014 discussion and the allegation that Official 2's office was not cleared to be the site of such a discussion. With regard to the 2013 incident, there is sufficient documentary evidence in the record to find that the Individual did, in fact, obtain prior verification of the clearance level of Official 1. *See* Ex. G; Ex. H; Ex. I; Ex. J. Consequently, the Individual has resolved the security concern arising from that allegation.

With regard to the 2014 incident involving Official 2, there is also sufficient documentary evidence in the record by which I can conclude that Official 2 did possess the required security clearance. *See Ex. A.* The Individual has also submitted evidence indicating that Official 2's office was cleared by another executive branch agency as a secured location to conduct discussions of this type. *See Ex. B.* Nonetheless, there is no evidence that Official 2's office was cleared for such a discussion by his facility's security department and the Individual has admitted his error in not formally using the security department's procedures to determine if such a discussion could be held at that location.

During the hearing, the Individual has indicated that he did not receive specific training regarding some security procedures. *See Tr. at 142* (cell phones); *Tr. at 148* (receiving only "generic" instructions on safeguarding documents on his desk and use of classified computer). However, there is testimony from the Supervisor that there were signs clearly indicating the prohibitions against cell phones in the Individual's work area. *Tr. at 70.* Given the available evidence, there is insufficient evidence for me to find that the Individual's lack of training is a mitigating factor regarding the post-2010 security incidents.

The record indicates that the Individual has had a number of breaches of security rules since beginning work at the DOE facility, notwithstanding my findings above regarding the 2013 and 2014 incidents. The latest incident, occurring in 2014, is still a security concern because the Individual did not use the proper procedures to ascertain if he could have a discussion of the specially classified materials in the official's office or use the security department's procedures to ascertain Official 2's clearance level. The Individual's history of security lapses from 2010, as a whole, raise concern regarding the Individual's ability to meet the significant demands of protecting classified information. My finding is supported by the testimony of the Supervisor who opined that, while he believed that the Individual could hold a security clearance, the Individual "would have to be supervised" and that his environment would have to be "structured." *Tr. at 66.* With regard to these incidents, I do not find any mitigating factors as listed under the Adjudicative Guidelines to be applicable.

As for the pre-2010 security incidents, most occurred over 20 years ago before the Individual began work at the facility. The Individual for the most part has admitted his responsibility for these incidents, which involve lapses in proper protection of classified materials. The Adjudicative Guidelines cite passage of time as a potential mitigating factor regarding Guidelines E and K. *See Adjudicative Guidelines, ¶¶ 17(c), 35(a).* However, given the Individual's recent history of security incidents, I do not find that these incidents have been fully mitigated by the passage of time and are still relevant in determining the Individual's ability to possess a security clearance. Significantly, the 1996 incident where the Individual took a classified document to his home represents a major error in judgment. The Individual has cited a lack of training as a factor contributing to the pre-2010 incidents. However, other than the Individual's testimony, there is no other evidence regarding the issue of whether the Individual was not adequately trained. Given

this, I find that there is insufficient evidence in the record where I can find that the Individual's alleged lack of training is a mitigating factor.

The Individual has held a clearance and has been working with classified materials for over 30 years. While the number of security lapses may not seem excessive when compared to the Individual's lengthy career, the number of recent security incidents is significant. I make this finding noting that the Individual has rendered stellar service to the nation as supported by two affidavits from individuals under whom the Individual has served.⁷ See Ex. E; Ex. F. Based upon the evidence before me, I must find that the security concerns raised by the Criteria G and L derogatory information have not been resolved at this time.

VI. Conclusion

In the above analysis, I found that there was reliable information that raised substantial doubts regarding the Individual's eligibility for a security clearance under Criteria G and L of the Part 710 regulations. After considering all of the relevant information, favorable and unfavorable, in a comprehensive, common-sense manner, including weighing all of the testimony and other evidence presented at the hearing, I find that the Individual has not presented sufficient information to resolve the cited security concerns. Therefore, I cannot conclude that restoring the Individual's access authorization "will not endanger the common defense and is clearly consistent with the national interest." 10 C.F.R. § 710.7(a). Accordingly, I find that the DOE should not restore the Individual's access authorization at this time.

Richard A. Cronin, Jr.
Administrative Judge
Official of Hearings and Appeals

Date: March 17, 2016

⁷ Both individuals noted in their affidavits that, during their time working with the Individual, they had no concerns regarding the Individual's ability to protect classified information. However, both individuals stated that they had no personal knowledge of the incidents described in the Notification Letter. Ex. E at 3; Ex. F at 3.